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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 678

NAFI CORPORATION,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION,

and

TEXTILE WORKERS UNION OF AMERICA, LOCAL UNION NUMBER 981,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County.

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To the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County.

NAFI Corporation prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County, entered on the 24th day of April, 1963, which affirmed a certain judgment entered by the Common Pleas Court of Hancock County, Ohio.

OPINIONS BELOW.

The Supreme Court of Ohio did not render any opinion. The opinions of the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County, and the opinion of the Common Pleas Court of Hancock County, Ohio are set forth in the appendix. These opinions have not been officially reported.

JURISDICTION.

Notice of appeal was filed in the Supreme Court of Ohio and in the Court of Appeals on the 10 day of May, 1963. Motion for an order directing the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County to certify its record to the Supreme Court of Ohio was filed on May 23, 1963. Judgment of the Supreme Court of Ohio overruling the motion to certify was entered on July 3, 1963. Application for rehearing was filed in the Supreme Court of Ohio on July 15, 1963 and was denied September 25, 1963. The judgment of the Supreme Court appears in the appendix.

The jurisdiction of this Court is invoked under Labor Management Relations Act, 1947, Section 301 (a); 29 U. S. C. Section 185 (a), on the ground that it is one of the functions of the Supreme Court of the United States to resolve and accommodate conflicts of decisions resulting from concurrent state and federal jurisdiction over cases arising under Federal Law.

QUESTIONS PRESENTED.

1. Is vacation pay not wages either as a matter of law or as treated by the collective bargaining agreement?

2. Is an employer required to submit to arbitration the question of whether the term wages includes vacation pay, under a collective bargaining agreement with a union expressly providing that any dispute or grievance, except wages, may be submitted to arbitration, but not expressly providing that questions of meaning and interpretation may be submitted to arbitration?

STATUTES INVOLVED.

29 U. S. C. Section 185(a) (Labor Management Relations Act, 1947, Section 301(a)):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT.

The employer's business was one that affected interstate commerce and the union represented its employees. The petitioner, as employer, operated a plant at Findlay, Hancock County, Ohio, which it was forced to close due to loss of business. As a result, there was no further work for members of respondent, Textile Workers Union of America, Local Union Number 981. On behalf of its members formerly employed by petitioner, the union claimed compensation for vacation pay for such members and attempted to submit the claim to arbitration to the respondent, American Arbitration Association, under a collective bargaining agreement dated March 1, 1956.

Petitioner began an action in the Common Pleas Court of Hancock County, Ohio, asking for a declaratory judgment and for a construction of the collective bargaining agreement and asserted that, in effect, compensation claimed for vacation pay was wages and, therefore, the dispute was not subject to arbitration but was a dispute excepted from arbitration.

Article V of the collecting bargaining agreement related to grievances and set forth a grievance procedure

Section 1 thereof provided that any dispute or grievance, excepting wages, which could not be resolved by the grievance procedure may be submitted to arbitration by either party and Section 7 thereof provided that the grievance procedure should be the exclusive method of handling grievances.

Article VI of the collective bargaining agreement contained four sections relating to wages and Article VII contained seven sections relating to vacations, vacation pay and the formula for determining the length of vacations, and the amounts of vacation pay.

Article X of the collective bargaining agreement contained one section under the caption of non-liability and provided as follows:

"It is hereby agreed by the Union and the Employer that since this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences, disagreements or controversies of any nature or character and there should be no resort to strikes (which include work stoppages or slowdowns) by the Employees or any lockout by the Employer of any Employee or group of Employees. In view of the foregoing, the Union agrees that it will not authorize any strike, it being understood and agreed, however, that any strike not expressly authorized or ratified in writing by the General President of the Union (a copy of which shall be sent to the Employer) shall be deemed for all purposes an unauthorized strike for which there will be no liability on the part of the Union, its Local Union or Joint Boards.

In the event of an unauthorized strike, the Union will endeavor to secure a return of the strikers to work to the end that the dispute may be then settled peaceably in accordance with the procedures set up herein. In such cases the Employer may impose disciplinary measures upon dis-

charge of the Employees involved, in accordance with and subject to the grievance and arbitration provisions of this Agreement as to the facts of participation by the Employees, incitation or instigation by the Employer and whether the discipline was fair, appropriate and justified under all the circumstances. The grievance and arbitration provisions as contained in this Agreement shall be the sole recourse and exclusive remedy of the Company and the Union in the event of a breach of this Agreement."

During the pendency of the cause in the Common Pleas Court of Hancock County, Ohio, respondent, Textile Workers Union of America, Local Union No. 981, filed petition for removal to the United States District Court, Northern District of Ohio, Western Division, upon the ground that the cause was one over which the district courts of the United States have original jurisdiction under the provisions of Section 301 (a) of the Labor-Management Relations Act of 1947 as amended, 29 USC 185. On motion of petitioner to remand to the State Court, motion to remand was sustained and the case was remanded back to the Common Pleas Court of Hancock County, Ohio.

The trial court ruled that a bona fide dispute over the meaning and interpretation of the provisions of the contract was in existence but that such dispute was not an exception to arbitrability under the decisions of the Supreme Court of the United States in *U. S. Steelworkers v. American Manufacturing Company*, 363 U. S. 564, and related cases and under the case of *New Bedford Defense Products Division v. Local 1113, U. A. W.*, 258 Fed. (2) 322.

Petitioner appealed to the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County, Ohio, and that Court, one of the three members dissenting,

affirmed the trial court, holding that vacation pay is not wages, either as a matter of law or as treated by the working agreement or union contract and based its decision, in part, upon *New Bedford Defense Products Division v. Local 1113, U. A. W.*, 258 Fed. (2) 522.

REASONS FOR GRANTING THE WRIT.

The agreement does contain a clause expressly excepting from arbitration wage disputes and wage grievances. It does not contain a clause expressly excepting from arbitration vacation pay disputes and vacation pay grievances. It does not contain a clause expressly committing to arbitration disputes as to its meaning and interpretation.

Does the presence of the first clause but the absence of the other two clauses require the dispute as to whether vacation pay is excluded, by virtue of the exclusion of wages, to be submitted to arbitration? In *United Steelworkers of America v. American Mfg. Company*, 363 U. S. 564; *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U. S. 577 and *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U. S. 593, the parties had agreed to submit all questions of contract interpretation to the arbitrator. Those cases do not appear determinative of the arbitrability issue involved here.

On the other hand, if the *Steelworkers* cases be determinative of the arbitrability issue involved here and if the meaning and interpretation of the agreement is arbitrable it would appear that the Court of Appeals for Hancock County, Ohio was limited in its judicial inquiry to the search for an explicit provision which would bring the dispute under the cover of an exclusion clause and, such exclusion clause being present, it exceeded the limitation

on its judicial inquiry in holding that, as a matter of law, the term wages does not embrace vacation pay and would thereby have resolved the dispute otherwise than by arbitration.

In the event the *Steelworkers* cases be not determinative of the arbitrability issue involved here, and the Court of Appeals of Hancock County, Ohio was within its limitations under Federal Labor Law in disposing of the dispute upon its merits, was it correct in its conclusion that vacation pay is not wages as a matter of law?

In *New Bedford Defense Products Division v. Local 1113 U. A. W.*, 258 Fed. (2) 522, the exclusion clause provided that matters involving the general wage scale should not be a subject for arbitration. The question there was whether vacation pay was thereby excluded from arbitration. The Court held that the issue of vacation pay did not involve the wage scale. Whether the exclusion of the wage scale from arbitration or whether the words "wage scale" embraced vacation pay is not necessarily determinative of the question as to whether the term "wages" embraces vacation pay.

In the case of *Brampton Woolen Co. v. Local Union 112, et al.*, 95 New Hampshire 255; 61 Atlantic (2) 796, the Collective Bargaining Agreement did affirmatively provide for the arbitration of wages and the question before the New Hampshire Supreme Court was whether a dispute as to vacation pay was thereby affirmatively made arbitrable. The court held that there could be little doubt that workers generally consider that the money which comes to them as a result of their labors, whether it be regular pay, overtime or vacation pay, is a part of their wages and that courts have recognized that fact. The court cited *Wil-Lo Cafeteria, Inc.*, 111 Fed. (2) 429 and *In Re Public Ledger*,

161 Fed. (2) 762, in support of its position. The Court further pointed out that neither was it controlling that vacation pay appeared under a separate article in the collective bargaining agreement from that devoted to wages or that the word pay rather than wages was used in connection with vacation pay.

There are two important questions of federal labor law involved in this case and the Court of Appeals of the Third Appellate Judicial District of Ohio, Hancock County and the Supreme Court of New Hampshire are squarely in conflict and the question affects a large number of persons. Consequently, the Court should grant the petition for certiorari in this case and pass upon the questions.

Respectfully submitted.

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APPENDIX A.

Opinion of the Court of Common Pleas of Hancock County, Ohio.

This matter comes on upon motion of defendant for summary judgment on the petition and answer under the provisions of Ohio Revised Code Section 2711.01 *et seq.* Revised Code Section 2311.041 (A) provides as follows:

> "(A) A party * * * against whom a * * * declaratory judgment is sought, may at any time after the action is at issue move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> "(B) The hearing on a motion for a summary judgment shall not be less than ten days after the date of the filing thereof * * *. The adverse party, prior to the day of hearing may file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

A defendant such as the Textile Workers Union is permitted by statute to seek a summary judgment. 16 *O. Jur.* (2d) Declaratory Judgment Section 39, wherein it is said:

> "The Declaratory Judgment Act provides that the declaration of rights, statutes, and other legal relations in a declaratory judgment action may be affirmative or negative in form and effect. The rights of the parties will be declared, where such rights are in law or equity."

A contract between the parties is contained in the pleadings (Exhibit A) and it is admitted in the answer. The relief sought by the plaintiff is to the effect that it does

not have to proceed to arbitration. Another way of stating it is, as counsel for the plaintiff has, "The whole question is over construction of the contract."

There appears to be no material fact involved in this case. The matter as previously stated is one involving a matter of construction of a contract, and therefore, pursuant to the above quoted code section, summary judgment may be rendered.

In the event that a party, the plaintiff here, contends that there are material issues of fact involved, he may proceed as provided in the Summary Judgment Act, Subsection (D) as follows:

> "(D) * * * When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleadings; but his response by affidavit or otherwise provided in this Act, may set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Court considers no response has been made as provided by the above section.

Article V, Section 3 of the contract in question provides as follows:

> "A dispute or grievance, excepting wages, which cannot be resolved in the foregoing matter, may be submitted to arbitration * * *."

The crux of the contention of the plaintiff is that the words "excepting wages" relieves the plaintiff of arbitration in the matter of vacation pay. The contract provides, however:

> "Any and all disputes, differences, disagreements, or controversies of any nature or character are open to arbitration." Article X, Section 1, page 28.

The plaintiff contends the word "wages" includes the matter of vacation pay. Among several cases, there being no Ohio case in point, is the case of *New Bradford Defense Products Division v. Local 1113, UAW*, 258 Fed. (2d) 522, wherein the Court said with regard to claim for back vacation pay:

> "The grievance now in question, for instance, does not seek to subvert the maximum hourly rates of $1.75 for Forging Operator or to challenge the three cent differential between the pay of a Forging Operator and a Breaking Operator, as given in the general wage scale attached to the agreement as Exhibit A."

And further on:

> "It is certainly of no consequence that, under various public statutes, such as Bankruptcy Act, Social Security Act, or Labor Management Relations Act, the term "wages" is held to include various so called "fringe benefits" of which vacation pay is one. The phrase 'Matters involving the general wage scale' was here used in a wholly different contention, prescribing an exception to arbitrability of grievances under collective bargaining agreement."

It is not for this Court or any other Court to weigh the merits of the grievance. It is pointed out that the matter may be arbitrable and eventually decided by the arbitrators in favor of the plaintiff.

The following language appears in *U. S. Steel Workers v. American Manufacturing Company*, at page 1346, wherein the union sought to compel arbitration of a grievance.

> "The question is not whether in the mind of a court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling every and all disputes that arise under the agreement.

"The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose for which they are intended to serve. See *Lewis v. Benedict Coal Corporation*, 361 U. S. 459, 468; 80 S. Ct. 489. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong, is a question of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong, is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

. . "The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious."

The arguments made in the before cited *New Bradford* case are applicable in this case. As noted, it was therein argued that because of the provision in the contract that "Matters involving the general wage scale or

differentials in the maximum hourly rates which are established at effective date of this agreement shall not be a subject for arbitration," do not apply to the matter of vacation pay. The court pointing out in detail, concluded as follows:

> "But surely the exception to arbitrability in Article II, Section 3 supra was not intended to exclude all grievances having any relation to earnings."

It is apparent that a bona fide dispute over the meaning and interpretation of provision of the contract is in existence. This is all that is required to compel arbitration pursuant to Revised Code Section 2711.03. Whether or not the plaintiff is correct as to his contention with respect to the merits is beside the point. This Court agrees, for the most part, with the logic and authorities cited in defendant's briefs.

Summary judgment for defendant. Exceptions to plaintiff. Restraining order disallowed.

JOE M. MOORHEAD, *Judge*.

APPENDIX B.

Opinion of the Court of Appeals of Hancock County, Ohio.

YOUNGER, J.

The plaintiff-appellant operated a plant in Findlay, Ohio, which it was forced to close due to loss of business. The defendant, Union, on behalf of its members formerly employed by plaintiff claimed compensation for vacation pay for such members and attempted to arbitrate the matter by submitting it to the defendant, Arbitration Association, as provided for in the working agreement of March 1st, 1956, which provided in Article V, Section 3, in part,

> "Any dispute or grievance excepting wages * * * may be submitted to arbitration by either party."

Plaintiff commenced an action in Common Pleas Court asking for a declaratory judgment and construction of the working agreement and claimed that the compensation claimed for vacation pay was, in effect, wages and therefore the dispute was not subject to arbitration. A motion by the defendant, Union, for summary judgment was granted and plaintiff's petition was dismissed. From that order this appeal originates.

In its order the trial court found "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In support of its motion for summary judgment the union submitted the affidavit of Earl Kirkendall, president of the union. The essence of this affidavit is that plaintiff ceased the major part of its production operations on or about July 30th, 1958, leaving numerous members of the union ready, willing and able to return to work who had worked more than 1060 hours during the period of June 1st, 1957, and May 31st, 1958; that pursuant to Sections 1, 2, 3 and 4 of Article VIII employees working more than

1000 hours would be entitled to two days, one week, two weeks, or two weeks with additional days of vacation pay, based upon length of service with plaintiff company; that such employees were entitled to such pay; that earned vacation pay in accordance with the agreement was paid by plaintiff for the previous year; that numerous meetings were held between plaintiff and the union concerning the payments claimed; and that

> "it is the position of the union that a genuine bona fide dispute exists between the Union and the Company over the meaning and interpretation of all the provisions of Article VIII of the contract, supplemented by the customs, practices and agreements of the parties pursuant thereto. Such dispute must be resolved under the provisions of Article V Section 3 of the agreement * * *. Consequently the Company is in violation of Article V Section 3 in not submitting this dispute to arbitration."

Plaintiff submitted two affidavits. The affidavit of George N. Lindner, Director of Industrial Relations of plaintiff stated that the company lost contracts; reduced the number of employees; that prior to May 31st there was no work and that as a result the members who now claim vacation pay were not on the payroll of plaintiff as of June 1st, 1958; that the company acted in good faith and completely closed its operations in August, 1958.

The affidavit of C. W. Cheek, submitted by plaintiff states that the affiant, a Certified Public Accountant, is of the opinion that the compensation, if any, due the former employees "is Wages" for the reason that vacation pay is subject to deduction for withholding taxes, social security, state, local and federal income tax purposes, and among other things is used in computing the employers contribution to the state workmens compensation fund, etc.

The majority of this court are of the opinion that the action of the trial court should be affirmed; that vacation pay is not wages, either as a matter of law or as treated by the working agreement or the union contract, which is attached to and made part of the petition and that there is no genuine issue as to any material fact, and that therefore, the motion for summary judgment was properly granted.

In the union contract the subject of wages is covered by Article VI, while vacation pay is covered by Article VIII. There is nothing in the contract which could be interpreted as an intention of the parties to consider vacation pay as wages. The only basis for the claim of the company that vacation pay is wages, is that after it has been determined that an employee is entitled to vacation pay:—that is, that he was on the payroll on June 1st, that he had worked one thousand hours or more since May 31st of the preceding year, that he had not been justly discharged or quit his job, and was in all respects eligible thereto under the provisions of Article VIII—he was paid money by the company in the same form as his wages had been paid during the previous year. Form, however, and substance are not the same.

Wages are easily determined. X hours multiplied by Y amount per hour equals Z, gross wages. By subtracting the deductions the size of the pay check is mathematically arrived at. Not so with vacation pay. Whether or not the employee is entitled to vacation pay depends upon many things as enumerated above, some of which could be subject to dispute and as claimed by the union would be subject to arbitration. The affidavit of Earl Kirkendall states that there is a dispute over the "meaning and interpretation of all of the provisions of Article VIII of the contract, *supplemented by the customs, practices and agreements of the parties pursuant thereto.* (Emphasis added.)

The majority of the members of this Court are of the opinion that the customs, practices and agreements referred to, apply only to the computation of vacation pay and the eligibility of the employees to receive the same. They have no relation to the question of whether or not vacation pay is wages nor do they refer to Article VI or wages. By the specific terms this portion of the affidavit applies only to Section VIII, which sets forth conditions, eligibility, amounts and terms of vacation pay. To hold it has any relation to the issue of whether or not vacation pay is wages would be contrary to the contention of the Union and the Union could not be expected to allege something in its own affidavit which would defeat its contention and lose its case.

In the case of New Bedford Defense Products vs. Local 1113, 258 Federal Reporter 2nd, 522, the facts are practically the same as in the instant case. The Firestone Company lost some government contracts, reduced its operations and laid off numerous employees who claimed they were entitled to vacation pay. The Union attempted to arbitrate but the company refused, claiming the dispute was not arbitrable under the provisions of the contract, which provided:

> "Matters involving the general wage scale * * * shall not be a subject for arbitration."

The District Court held that the company had contracted to refer the grievance in question to arbitration and decreed for specific performance. The Circuit Court of Appeals affirmed. The court held that the issue did not involve the wage scale, and stated:

> "It is certainly of no consequence that under various public statutes, such as the Bankruptcy Act * * * the Social Security Act * * * or the Labor Management Relations Act * * * the term "wages" is held to

include various so-called "fringe benefits" of which vacation pay is one."

For the reasons above stated, the trial court will be affirmed.

MIDDLETON, P.J. concurs.

GUERNSEY, J., dissents.

GUERNSEY, J., dissenting: I dissent from the judgment and from the foregoing opinion.

As provided by Section 3 of Article V of the agreement executed by the parties as of March 1, 1956, and attached to the petition, all disputes or grievances "excepting wages" which could not be resolved by the parties might be submitted to arbitration by either party.

Under these circumstances if "vacation pay" constitutes "wages" a dispute or grievance involving same is not arbitrable as a matter of right. However, we are not necessarily concerned with whether vacation pay does or does not constitute wages in common parlance or even in general industrial custom and practice. Our concern is whether or not *these* contracting parties have agreed that "vacation pay" is included in the term "wages" as used in the arbitration clause hereinbefore referred to.

If the contract attached to the petition were admittedly the only agreement by and between the parties and if it could be construed without reference to any custom or practice there would exist no issue of fact to be determined and the trial court could then have properly decided, as a matter of law, by contractual interpretation and construction, whether vacation pay constituted wages under the arbitration clause.

However, although the defendant Union has admitted in its answer the existence of the agreement of March 1,

1956, it has not admitted this to be the sole pertinent agreement, and by paragraph 8 of the affidavit of Earl Kirkendall filed and offered in support of its motion for summary judgment it is stated that "it is the position of this Union that a genuine, bona fide dispute exists between the Union and the Company over the meaning and interpretation of *all* the provisions of Article VIII of the contract (the vacation pay article of the March 1, 1956, contract) *supplemented by the customs, practices, and agreements of the parties pursuant thereto.*" (Emphasis and parenthetical phrase added.) The *customs, practices* and *agreements* of the parties do not appear in or annexed to the pleadings nor do they appear in any of the affidavits filed by the defendant Union or by the plaintiff in connection with the motion for summary judgment.

Defendant Union contending the existence of these customs, practices and agreements with reference to vacation pay, and same not being in the record before the trial court, the defendant, itself, thus raised an issue of fact as to whether these customs, practices and agreements existed at all, and, if so, as to what they were. The presence of this issue of fact prevents a summary judgment as it is provided, among other things, by Section 2311.041 Revised Code:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment *as a matter of law*. A summary judgment shall *not* be rendered unless it appears from the pleadings, depositions, answers to interrogatories, admissions of the genuineness of papers or documents, and affidavits, if any, that reasonable minds can come to but one conclu-

sion and that conclusion is adverse to the party against whom the motion for summary judgment is made; *the party against whom the motion for summary judgment is made is entitled to have such depositions, answers to interrogatories, admissions of the genuineness of papers or documents and affidavits construed most strongly in his favor.*" (Emphasis added.)

It is of no aid to defendant Union that the existence of this issue of fact appears in its own affidavit. It has been held in just such a situation that a summary judgment must be denied. Oliver, Admr. v. Kaszo, 116 O. A. 398.

I cannot fathom how this court could conclude that "the customs, practices and agreements referred to apply only to the computation of vacation pay and the eligibility of the employees to receive the same," and "have no relation to the question of whether or not vacation pay is wages nor do they refer to Article VI or wages," when none of these customs, practices and agreements are in our record.

For these reasons, and without expressing any opinion as to whether or not vacation pay herein constitutes wages for the purpose of arbitrability, I am of the opinion that the trial court committed error prejudicial to the appellant in rendering summary judgment in favor of defendant Union and in its separate judgment ordering arbitration by the defendant American Arbitration Association, that these judgments should be reversed, and the cause be remanded to the trial court for further proceedings.

APPENDIX C.

Judgment of the Supreme Court of Ohio.

(Decided July 3, 1963.)

It is ordered by the Court that this motion is overruled.

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Respondents.

BRIEF OF RESPONDENT TEXTILE WORKERS UNION OF AMERICA, LOCAL UNION NO. 981, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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January 16, 1964.

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BRIEF OF RESPONDENT TEXTILE WORKERS UNION OF AMERICA, LOCAL UNION NO. 981, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. COUNTERSTATEMENT OF QUESTION BEFORE THE COURT.

In excepting wages from arbitration, does the labor-management contract before the Court exclude from arbitration a claim for vacation pay either (1) expressly or (2) by evidence of such intent sufficiently forceful to require a court to so hold rather than permitting an arbiter to determine whether the claim is arbitrable?

The courts below have answered NO.

This respondent would answer NO.

II. STATEMENT OF THE CASE.

The Petitioner operated in Findlay, Ohio a manufacturing plant in an industry affecting commerce. The Respondent, the Textile Workers Union of America, Local No. 981, represented its employees, pursuant to a certification by the National Labor Relations Board.

In 1958 the employer closed its plant and the union requested accrued vacation pay for certain of the former employees. Negotiations were unsuccessful and in October, 1959 the union referred the matter to arbitration by the Respondent American Arbitration Association, and after further negotiations notified it that the arbitration should proceed.

In January, 1960 the employer filed suit in the Common Pleas Court of Hancock County, Ohio, seeking a declaratory judgment that the union's claim for vacation pay was not subject to arbitration because the collective bargaining agreement between the employer and the union, Article V, Section 3, says wages are not arbitrable.

The employer argues that because vacation pay is regarded as income, like wages, for purposes of income tax, social security, unemployment compensation, and workmen's compensation the exclusion of wages from the arbitration procedure bars arbitration of the union's grievance with respect to vacation pay.

It is the union's position that vacation pay is treated separately in this contract from wages and for this purpose is not encompassed by the word "wages"; that the contract does not exclude vacation pay from arbitration either expressly or by evidence of such intent sufficiently forceful to require a court to so hold; and that the issue of arbitrability is one that the contract and therefore federal law require the parties to submit to an arbitrator. The contract provides in part as follows:

ARTICLE V

GRIEVANCES

Section 1. The Company shall meet with the Representatives of the Union, at time mutually convenient to both Parties, for the prompt settlement of any dispute or grievance which may arise between the Employees and the Company. * * *

Section 2 Should any grievance arise, the following steps shall be taken for settlement of same. * * *

Section 3. Any dispute or grievance, excepting wages, which cannot be resolved in the foregoing manner may be submitted to arbitration by either Party, by giving written notice to the other Party within ten (10) days after final discussions are held thereon. In any matter filed for Arbitration hereunder, a request shall be made of the American Arbitration Association to name the Arbitrator, in accordance with the rules of voluntary arbitration governing such Association. * * *

Section 6. The Arbitrator may not add to, subtract from, or opinionate on, the Agreement or any part of it. The decision of the Arbitrator shall be final and binding on both Parties.

Section 7. This grievance procedure shall be the exclusive method for the handling of grievances. * * *

ARTICLE X

NON-LIABILITY

Section 1. It is hereby agreed by the Union and the Employer that since this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences, disagreements or controversies of any nature or character and there should be no resort to strikes (which include work stoppages or slowdowns) by the Employees or any

lockout by the Employer of any Employee or group of Employees. In view of the foregoing, the Union agrees that it will not authorize any strike * * *.

"* * * The grievance and arbitration provisions as contained in this Agreement shall be the sole recourse and exclusive remedy of the Company and the Union in the event of a breach of this Agreement.

"ARTICLE XI

RENEWAL PROVISO

"This Agreement shall become in full force and effect on this date, March 1, 1956, and shall continue for three (3) years and from year to year thereafter, or until modified, amended, or canceled as herein provided. * * *"

The union removed the case to the United States District Court for the Northern District of Ohio, Western Division, on the ground that federal jurisdiction was created by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, 61 Stat. 156, but the employer's motion to remand was sustained.

The union then filed in the Common Pleas Court a motion for summary judgment, supported by affidavits. The motion was granted, the court citing and quoting at length from *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, 46 LRRM 2414, 34 LA 559, June 20, 1960. Citing also *New Bedford Defense Products Division v. Local 1113, UAW*, 258 F. 2d 522, 42 LRRM 2518, the Common Pleas Court held that the exclusion of wages from arbitration did not necessarily exclude vacation pay, and directed the parties to proceed to arbitration.

On the employer's appeal to the Ohio Court of Appeals the Common Pleas Court was sustained. The Court of Appeals expressly rejected the employer's argument

that vacation pay is wages either as a matter of law or as treated by the union contract. The exact language of the Court's opinion is as follows:

> "The majority of this Court are of the opinion that the action of the trial court should be affirmed; that vacation pay is not wages, either as a matter of law or as treated by the working agreement or the union contract, which is attached to and made part of the petition and that there is no genuine issue as to any material fact, and that therefore, the motion for summary judgment was properly granted." (Appendix B, Petition for Certiorari, p. 16.)

Following the decision by the Ohio Court of Appeals the employer petitioned the Ohio Supreme Court for an order to certify the record to it for review. The petition was denied and subsequent motion for rehearing was likewise denied, September 25, 1963.

III. MANNER OF RAISING FEDERAL QUESTIONS.

The federal question was first raised in the state courts by the union's motion for summary judgment in the Court of Common Pleas. The Common Pleas Court treated the issue as one governed by federal law and decided it favorably to the union, ordering arbitration.

IV. REASONS FOR NOT GRANTING THE WRIT.

This Court's Rule.

Rule 19 of the Rules of this Court states in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion,

indicate the character of reasons which will be considered:

> (a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Neither of these circumstances is present here. The state courts decided a federal question of substance that had already been determined by this Court and decided it in a way clearly in accord with this Court's applicable decisions.

Applicable Principle of Federal Law.

An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, at 582, 4 L. ed. 2d 1409, 80 S. Ct. 1347, 46 LRRM 2416, 34 LA 561, June 20, 1960.

The employer argues that the exclusion from arbitration of wages excludes arbitration of vacation pay. It acknowledges, however, that the contract does not contain a clause *expressly* excluding vacation pay from arbitration. Thus the employer is in the position of saying that the exclusion of wages *impliedly* excludes vacation pay from arbitration. But on this point the union disagrees, pointing out that the contract treats wages and vacation pay separately and that *New Bedford Defense Products Division v. Local 1113, UAW*, 258 F. 2d 522, 42 LRRM 2518 held that vacation pay was not excluded from arbitration by a contract that excluded "matters involving the general wage scale."

The Contract Requires Arbitration.

Such a dispute between the company and the union is expressly committed to arbitration. Article V, Section 1, as quoted above, refers to "any dispute or grievance." Article V, Section 3 says "any dispute or grievance, excepting wages, which cannot be resolved in the foregoing manner, may be submitted to arbitration by either party * * *."

Whatever may be determined eventually as to whether "wages" includes "vacation pay" the dispute as to whether or not it does is not "wages." Thus this dispute as to arbitrability is clearly committed by the contract to decision by an arbiter.

Steelworkers v. American Manufacturing Co., 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, 46 LRRM 2414, 34 LA 559, June 20, 1960, placed much weight on the fact that the no-strike clause provided for no exception and held that for this reason none should be read into the grievance clause, "since one is the *quid pro quo* for the other."

This is precisely the situation we have here. Article X recites:

> * * * this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences, disagreements or controversies of any nature or character and there should be no resort to strikes (which include work stoppages or slowdowns) by the Employees or any lockout by the Employer of any Employee or group of Employees. In view of the foregoing, the Union agrees that it will not authorize any strike * * *

And to reenforce the point Article X concludes:

> The grievance and arbitration provisions as contained in this Agreement shall be the sole recourse and

exclusive remedy of the Company and the Union in the event of a breach of this Agreement."

Brampton Woolen Case Distinguished.

The employer places heavy reliance upon *Brampton Woolen Company v. Local Union 112, et al.*, 95 N. H. 255, 61 Atl. 2d 796, 11 LA 487, 1948. In this case the court refused to enjoin the union from proceeding with arbitration of a claim to vacation pay under a contract that expressly provided that wages were arbitrable. It is difficult to know precisely what the holding of the court means in our situation because the opinion does not quote the exact language of the agreement. However, it is plain that the decision came before the development of federal law on this subject in the *Steelworkers'* cases cited above. Moreover, the New Hampshire court held that it was fundamental in its jurisdiction that the interpretation of a written contract is for the court. The present federal law governing our case is that where the parties are as broadly committed to arbitration as they are here the interpretation of the agreement is for the arbiter, unless there is "the most forceful evidence of a purpose to exclude the claim from arbitration." *Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U. S. at page 585.

CONCLUSION.

The state courts in our case have decided a federal question in accordance with federal law as laid down by this Court. They have decided that the subject of vacation pay is not excluded from arbitration by the exclusion of wages, either as a matter of law or as treated by the union contract, and that the dispute between the parties as to whether vacation pay is arbitrable must therefore be decided by arbitration.

The petition for certiorari should be denied.

Respectfully submitted,

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January 16, 1964.